No. 3932.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA,
Plaintiff, Appellant,

vs.

JOSEPH WOERNDLE,
Defendant, Respondent.

REPLY BRIEF OF RESPONDENT

Upon Appeal from the United States District Court for the District of Oregon.

JOHN S. COKE,
United States Attorney for Oregon,
for Appellant.

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ARGUMENT.

After the hearing of the within case before this Honorable Court on February 9th, counsel for the appellant asked for thirty days' additional time in which to file a reply brief to answer new matter set forth in respondent's brief. This time was granted appellant, and respondent was given fifteen days thereafter in which to file his reply brief.

Respondent's understanding of the practice of this Court is that a reply brief is only to answer new matter raised in opponent's brief. With this understanding in mind counsel has vainly searched appellant's reply brief for any answer to new matter, and with few exceptions has found only a repetition of arguments and quotations from appellant's original brief herein. For example, the long quotations found on pages 13, 14 and 15 of his reply brief are also found almost verbatim on pages 57, 55 and 73 of his original brief. The excerpts from the letters quoted in the reply brief have also all been quoted at least once, and some several times, in his original brief.

Points VIII and XIII of respondent's brief which are of some importance were not mentioned in appellant's original brief and are also not mentioned in his reply brief.

The first of these points, "That the admission of the letters of the defendant and all of them over the further objections of the defendant as to their inadmissibility on the ground of their not being

competent, relevant or material was improper as no complaint in this connection of any action of the defendant is made in the bill of complaint or the affidavit attached thereto," etc., was only referred to by appellant on page 5 of his reply brief, wherein he states: "The complaint does not solely rest as claimed by defendant, upon fraudulent acts of defendant with respect to the passport secured for and delivered to Hans W. Boehm, but it is based upon alleged fraud and false testimony given by the defendant in his naturalization proceedings, the evidence of which is shown in his various acts and written statements, commencing with the procurement of the Boehm passport in 1914 and extending thru the years 1914, 1915 and 1916."

An examination of the complaint and affidavit attached thereto absolutely fails to reveal anything but the passport matter and even in this the Government voluntarily admitted in open court that with the exception of the October 1914 passport, Woerndle had no knowledge of any of the other actions of Boehm as set forth at great length in the affidavit (Transcript, p. 121, where in referring to these matters the Statement of Evidence states "all of which, however, was done without the actual knowledge of the defendant Woerndle" and three lines below on the same page in referring to another passport "also without the actual knowledge of the defendant Woerndle.") How then under these facts, of which there can be no question, can counsel for the Government state in his reply brief "that the

complaint does not solely rest as claimed by the defendant upon the fraudulent acts of the defendant with respect to the passport secured for and delivered to Hans W. Boehm, but it is based upon alleged fraud and false testimony given by the defendant in his naturalization proceedings, the evidence of which is shown in his various acts and written statements, commencing with the procurement of the Boehm passport in 1914 and extending thru the years 1914, 1915 and 1916."

Another point made by the respondent which the appellant did not contradict or deny in any way whatsoever, either in his reply brief or in the arguments before this court, is point III, to-wit: "As a matter of fact and of law the defendant at the time of taking his oath of citizenship owed and had no allegiance to Germany by reason of his having voluntarily expatriated himself and having given up his rights as a German citizen and therefore could not have had a mental reservation as to his allegiance."

(Defendant's Exhibit "A," Transcript, p. 172.)

If silence gives consent then surely appellant's silence at all times on this point may mean acquiescence in the logic thereof.

Neither does appellant apparently find any cause of disagreement with the only two cases in the authorities under somewhat similar proceedings, which hold that actions of persons occurring prior to our entrance into the war are not such as could or would indicate a choice of allegiance, as between

the United States and any of the belligerents. In re Watkiss, 269 Fed. 466, and In re Cluny, 269 Fed. 464.

Respondent also disagrees with proposition Number 7 as stated on page 3 of appellant's reply brief, and in order to avoid unnecessary repetition, respectfully refers to pages 19 to 21 of respondent's brief for his contention in this respect.

Appellant on page 7 of his reply brief states: "In defendant's brief it is stated 'At the trial these documents and particularly a number of letters were introduced in evidence over the objections of the defendant (Transcript, p. 67).' It will be observed that this is an erroneous statement of fact."

In view of this statement we respectfully refer the Court to the Statement of Evidence duly signed by the trial court, which we believe should be conclusive of this matter (Transcript, p. 171), wherein it is stated "That all of the letters heretofore quoted....were admitted subject to the objection of the defendant that the same were incompetent, irrelevant and immaterial, and on the further ground that the same had illegally and unlawfully been taken from the possession of the defendant on admittedly invalid search warrants and in violation of the 4th and 5th Amendments to the Constitution of the United States." Regardless of any stipulations, regardless of any statements of counsel or anything else, here is the record on this subject, certified to without any objection by the trial court

and we believe the same will be given the credence to which it is justly entitled.

Apparently the defendant's exhibition of active loyalty to the United States during the war and for some time prior thereto, is a great disappointment to the Government, at least those who should most appreciate such action on behalf of one in defendant's position, are most ungenerous in giving him any credit therefor and admit his loyalty not because they want to be fair and just, but because they have no other choice. Instead of being just and saying without hesitation that there is no question of defendant's absolute loyalty to the United States from some time prior to July, 1916 (nearly a year before the United States entered the war), they say on page 23 of their brief: "By the time defendant wrote his friend Hans W. Boehm under date of July 14th, 1916 (Transcript, p. 164) it is probable that he had become so thoroughly familiar with German methods of warfare and so fully convinced that this country would soon be involved in the war, that he realized the wisdom of more caution and moderation in the language used in his letters and consequently there were no further anti-American expressions."

The Court will recall that this is the letter in which defendant referred to (Germany) as "the country second dearly loved by us all" (Transcript, p. 164), and as heretofore said if Germany was then only "second" in defendant's love, it would almost conclusively indicate that the "first" place of

love for the United States had never been usurped. This letter was written long prior to even any thought of any investigation of defendant's part in the passport matter, nor was there any evidence or even any claim of anything but the highest loyalty to the United States on the part of the defendant for some time prior to the date thereof down to the present writing, but the appellant is not fair enough to honestly admit these facts but maintains that this Court should only consider those actions of the defendant which they maintain show disloyalty and that he is not to be given the benefit of anything which would show the contrary. In short, the Government maintains that from certain alleged proven facts of defendant's action in 1914 and 1915 a natural and probable inference can be drawn that other facts existed, to-wit: that defendant had a mental reservation in favor of Germany in his oath of citizenship at the time of his naturalization in 1904. For the sake of the argument only admitting that this position is correct, then in that case other actions of the defendant occurring after the acts of 1914 and 1915 are admissible and proper to rebut or disprove any presumption that may have arisen from the prior acts and therefore the actions of the defendant showing his positive and active loyalty to the United States from 1916 up to the time of the filing of the complaint herein are worthy of serious consideration and in our opinion are sufficient and strong enough to overcome any presumption or inference which

might otherwise have been attributed to or have been drawn from the acts of 1914 and 1915. In other words, the Court is not confined solely to the consideration of inferences to be drawn from any particular acts of the defendant in 1914 or 1915, but must consider all facts and acts of the defendant presented to the Court occurring prior to the filing of the complaint, and only in this way can the Court arrive at a correct and just conclusion. In addition thereto the words of caution contained in the statement of Judge Hunt of this Honorable Court in Schurman vs. United States, 264 Fed. 919, are full of wise admonition for a trial court in the determination of matters of this kind, to-wit: "Courts should be very careful to avoid depriving one of citizenship upon evidence which, while proving lack of allegiance at the time of the investigation, may not by relation establish that there was lack of true faith and allegiance at the time of the issuance of the certificate to the applicant."

Appellant on page 27 of his reply brief states: "If the trial court was correct in the position that it was incumbent upon the Government to show that defendant had committed acts of disloyalty after this country had declared war upon Germany, then we concede that the Court was correct in its decree dismissing the Government's suit." While the Court perhaps would have been justified in taking such a position, still the fact remains that appellant's statement as to the position of the trial court is entirely at variance with the true position

taken by the trial court, and all that is necessary to prove the error of appellant's statement, is to refer to the opinion of the trial court itself, which shows that as a matter of law and fact the acts complained of were not considered disloyal and were not considered sufficient to justify the inference of mental reservation (Transcript, p. 115), where the court stated in its opinion: "But it is contended by the Government that defendant's attitude during the latter part of 1914 and the years 1915 and 1916 was such as to show by relation that he swore falsely in 1904 when he declared that he absolutely and forever renounced all allegiance and fidelity to the German Government."

"The evidence relied upon to sustain this position consists of information obtained from private memoranda of defendant and copies of private letters written by him to his relatives in Germany, which were obtained by an unlawful search of his home and office by officers of the Government in violation of the Fourth and Fifth Amendments to the Constitution of the United States, and which documents on his application were by the Court ordered returned to him, without objection by the Government. The evidence so obtained would not be admissible on a criminal trial, and I am in doubt whether the Government should be permitted to profit in this proceeding by knowledge so obtained."

"But, however that may be, it is not sufficient in my judgment to show that the defendant did not, in 1904, honestly and in good faith renounce and ab-

jure allegiance and fidelity to Germany. It all relates to his acts and statements in private letters and memoranda after the commencement of the war between Germany and England and several months prior to the time the United States became involved therein. It should be interpreted in the light of this fact and not that of subsequent events."

Does this justify the statement made by appellant heretofore referred to as to the court's position in the matter? The court could scarcely have made its position clearer and squarely gives its judgment on these facts and thereafter and after making the above statement and to show that no additional facts detrimental to the defendant have been proved, the court continues: "There is no evidence of a single act, statement, or conduct indicating allegiance to or sympathy with Germany after the entry of the United States into the war, but all the evidence is to the contrary."

Respondent scarcely knows how to comment upon the concluding paragraph of appellant's reply brief, especially in view of the fact that it states no legal conclusion or argument, but can only be considered as a reflection upon the opinion of the trial judge who heard the facts and dismissed the Government's complaint. We feel that the trial court's opinion does not merit such a comment, but believe that this concluding paragraph was written by counsel for the Government without sufficient reflection as to how it would be interpreted, and for this reason will say no more about it.

In conclusion respondent respectfully submits that as a matter of fact and of law and upon an entire consideration of all of the evidence herein, the trial court was clearly justified in dismissing the Government's complaint, and we respectfully maintain that this action of the trial court should be affirmed.

Respectfully submitted,

C. T. HAAS,

Attorney for Respondent.